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No. 221

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE, APPELLANTS

v.

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF OF THE UNITED STATES AND THE SECRETARY OF AGRICULTURE IN OPPOSITION TO THE APPELLEES' MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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CITATIONS

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STATEMENT

This appeal arises in connection with fifty individual suits (consolidated by stipulation of the parties for the purpose of trial and other proceedings) which were brought in the United States District Court for the Western District of Missouri, to suspend, enjoin, set aside, and annul an order dated June 14, 1933, made by the Secretary of Agri-

culture in a proceeding entitled *Secretary of Agriculture* v. *L. B. Andrews, doing business as L. B. Andrews Live Stock Commission Company, et al.*, Bureau of Animal Industry, Docket No. 311, instituted under the Packers and Stockyards Act, 1921 (7 U. S. C., c. 9, Sections 181–229; c. 64, 42 Stat. 159, *et seq.*).

The final order and decree from which the appellants have appealed was entered by the district court on June 18, 1938.[1] An order allowing appeal was entered by the district court on June 30, 1938, and the case was docketed in this Court on July 25, 1938. The history of this litigation is briefly summarized in the statement of jurisdiction which the appellants have hitherto filed pursuant to Rule 12, paragraph 1 of the rules of this Court.

The order and decree from which appellants have appealed directs the clerk of the district court to distribute to the appellees approximately $580,000 which have been impounded in the registry of the court pursuant to the terms of a temporary restraining order which the court entered on July 22, 1933. The funds so impounded represent the excess of the rates and charges collected by petitioners between July 24, 1933, and November 1, 1937, over and above the rates and charges found to be reasonable by the Secretary of Agriculture in the order which he made on June 14, 1933. The

[1] Because the record on appeal has not yet been printed, it has been impossible to insert the appropriate record references.

impounding ceased on November 1, 1937, because on that date a new schedule of rates agreed upon by the Secretary of Agriculture and the market agencies became effective. The pertinent provisions of the impounding order follow (R. 128) :[2]

> Provided, however, that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner.

On the same date that the district court entered the order and decree from which appellants have appealed, it also entered a decree setting aside the Secretary's order and permanently enjoining its enforcement. In that decree, however, the district court retained jurisdiction so that—

> such other proceedings [may] be had herein in conformity to the opinion of said Supreme Court with reference to the distribution or restitution of funds deposited by plaintiffs

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[2] This record reference is to *F. O. Morgan et al.* v. *United States and the Secretary of Agriculture*, No. 581, October Term, 1937.

> in the Registry of this Court with the Clerk thereof pursuant to the provisions of the temporary restraining order entered on the 22nd day of July, 1933, as to law and justice may appertain. * * *

This decree properly left the cause open for further proceedings in conformity with the mandate and opinion of this Court; for that reason appellants were not aggrieved by the decree and have not appealed therefrom.

The appellees have filed a statement in opposition to the jurisdiction of this Court and a motion to dismiss or, in the alternative, to affirm the final order and decree of the district court. This brief is submitted in opposition to that motion pursuant to the provisions of paragraph 3 of Rule 7 of the rules of this Court.

I

The Motion to Dismiss Should Be Denied Because the Final Decree and Order Entered by the District Court on June 18, 1938, Is Appealable as a Matter of Right

Section 316 of the Packers and Stockyards Act (7 U. S. C., Sec. 217) provides:

> For the purposes of sections 201 to 217, inclusive, of this chapter, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Com-

> merce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of sections 201 to 217, inclusive, of this chapter, and to any person subject to the provisions of sections 201 to 217, inclusive, of this chapter. (Aug 15, 1921, c. 64, § 316, 42 Stat. 168.)

The laws relating to suits brought to restrain enforcement of orders of the Interstate Commerce Commission are found in Title 28 U. S. Code, Sections 44, 47, and 47a (Act of October 22, 1913, c. 32, 38 Stat. 219). Section 44 provides that the procedure in the district courts in respect to cases brought to enjoin or set aside any order of the Interstate Commerce Commission shall be governed by the provisions of Sections 47 and 47a. Section 47 provides for the convening of a three-judge court upon application for an interlocutory injunction against an order of the Interstate Commerce Commission, and further provides that—

> * * * upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

Section 47a, relating to expedition and appeal, provides in part as follows:

> A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the

> Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases.

Section 238 of the Judicial Code, as amended (Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 936; 28 U. S. C., Sec. 345) provides that the Supreme Court has direct appellate jurisdiction to review the final decree of a district court made pursuant to Section 316 of the Packers and Stockyards Act (7 U. S. C., Sec. 217).

A. THE FINAL ORDER AND DECREE OF THE DISTRICT COURT IS APPEALABLE BECAUSE IT IS BASED UPON AN ERRONEOUS CONSTRUCTION AND APPLICATION OF THE MANDATE OF THIS COURT

After this Court handed down an opinion on April 25, 1938, holding that the Secretary's order was invalid, the appellants filed a petition for rehearing in which they called this Court's attention to the existence of the impounded funds, suggested that upon remand the appellees would doubtless contend that the funds belonged to them, and on that basis, among others, sought to have this Court rehear the case. In opposition to this petition appellees asserted that because the Secretary's order had been held to be invalid the release of the impounded funds followed as a matter of course and that no specific directions from this Court in respect thereto were required. In disposing of

these conflicting claims this Court used the following language (82 L. ed. 1031):

> The second ground upon which a rehearing is sought is that there is impounded in the District Court a large sum representing charges paid in excess of the rates fixed by the Secretary. The Solicitor General raises questions both of substance and procedure as to the disposition of these moneys. These questions are appropriately for the District Court and they are not properly before us upon the present record. We have ruled that the order of the Secretary is invalid because the required hearing was not given. We remand the case to the District Court for further proceedings in conformity with our opinion. What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide.

This Court thereupon remanded the case for further proceedings in conformity with its opinion. Appellants contend that the mandate, when read in the light of this Court's opinion, did not authorize the district court to distribute the impounded funds to the appellees without giving the Secretary of Agriculture a reasonable opportunity to correct his procedural mistake and to make a determination as to the reasonableness of the excess charges col-

lected by appellees. The appellees on the oth
hand assert that the order and decree of the distri
court was not only consistent with the mandate, b
indeed was required by its terms.

The district court's order and decree raises a
immediate issue as to the construction and a
plication of the mandate of this Court. It is we
settled that such an order and decree is appealab
under the statutory provisions applicable to th
case. *Baltimore and Ohio R. Co.* v. *United State*
279 U. S. 781, 785; *Arkadelphia Co.* v. *St. Lou*
S. W. Ry. Co., 249 U. S. 134, 142; *In re Sanfor*
Fork & Tool Co., 160 U. S. 247, 255; *Cf. In re Ci*
of Louisville, Kentucky, 231 U. S. 639.

In *Baltimore and Ohio R. Co.* v. *United State*
279 U. S. 781, the Interstate Commerce Commi
sion had ordered certain so-called east-side rai
roads (operated from the east into St. Loui
Missouri) to absorb transfer charges on certai
freight, the transfer charges having previousl
been borne by certain so-called west-side railroa
(operating from the west into St. Louis). Th
east-side roads brought a suit in the District Cou
for the Northern District of Illinois to set asi
the Commission's order. A three-judge distri
court, convened under the applicable statutory pr
visions, dismissed the bill of complaint. The Su
preme Court reversed the district court's decr
and remanded the case for further proceedings i
conformity with its opinion and decree (277 U.

291). The east-side roads thereupon applied to the district court for a decree requiring the west-side roads to pay to them the transfer charges which the east-side roads had been compelled to absorb by the Commission's order. The district court denied the application and the east-side roads appealed. The appellees filed a motion to dismiss on the same ground urged in the present case, i. e., the order of the district court was not reviewable by the Supreme Court on appeal. The Supreme Court held that the decree of the district court was appealable on the ground, among others, that the appeal raised a question as to the construction and effect to be given to the mandate. The Court said (279 U. S. 785):

> When a lower federal court refuses to give effect to or misconstrues our mandate, its action may be controlled by this court, either upon a new appeal or by writ of mandamus. *In re Potts,* 166 U. S. 263, 265. *In re Sanford Fork & Tool Co.,* 160 U. S. 247, 255, and cases cited. It is well understood that this Court has power to do all that is necessary to give effect to its judgments. The Act authorizes this appeal.

The appellants submit that since the question raised by this appeal is whether the lower court misconstrued and refused to give effect to the mandate of this Court, the decision in *Baltimore and Ohio R. Co.* v. *United States,* 279 U. S. 781, conclusively establishes the right to maintain the appeal;

and if that misconstruction is to be corrected, it must be corrected on this appeal, because the order directing the payment of the impounded funds to the appellees is final and definitive so far as the instant proceedings in the court below are concerned.

B. THE ORDER AND DECREE OF THE DISTRICT COURT IS ALSO APPEALABLE BECAUSE IT WAS ENTERED IN A PROCEEDING WHICH "IS INCIDENTAL TO AND IN EFFECT A PART OF THE MAIN SUIT"

In *Baltimore and Ohio R. Co.* v. *United States*, 279 U. S. 781, this Court held that the order there involved was appealable on still another ground in addition to the one which has been discussed above. The Court said (p. 785):

> Moreover the proceeding below out of which the denial of restitution arose is incidental to and in effect a part of the main suit. Under the Act a court of three judges was required for the entry of the decree on the mandate. *Ex parte United States, supra*, 424. *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 544. The jurisdiction of the court so constituted necessarily includes power to make all orders required to carry on such suits and to enforce the rights and obligations of the parties that arise in the litigation. This appeal rests on the same foundation as did the first. *Arkadelphia Co.* v. *St. Louis S. W. Ry.*, 249 U. S. 134, 142.

Quite apart from the controversy as to the proper construction of this Court's mandate, the final

order and decree of the district court is appealable because it, like the decree in the *Baltimore and Ohio* case, was entered in a proceeding incidental to and in effect a part of the main suit. Furthermore, it is an order which purports "to enforce the rights and obligations of the parties" that have arisen in this litigation. It makes no difference for this purpose whether the right which the appellees assert, and which the order seeks to protect, is one which arises "automatically," as appellees contend, or is one which was created by the order. Whatever may have been the ultimate origin of the asserted right, it was first given content and form by the order to which appellants now object. Until the district court had acted the right was inchoate. The appellees themselves tacitly recognized this fact by filing a motion asking the district court to direct the distribution of the impounded funds. Such an order which thus seeks to enforce a right which is asserted to have arisen in the course of the litigation, and which is made in a proceeding "incidental to and in effect a part of the main suit" is clearly appealable under the decision of this Court in *Baltimore and Ohio R. Co.* v. *United States*, 279 U. S. 781.

There is no merit in the appellees' suggestion that the order and decree may be regarded as an exercise of the discretion of the district court or that the only possible ground for attacking the order is that its entry was an abuse of that discretion.

On the contrary the appellants contend that as a matter of law the district court had no right to order the distribution of the impounded funds to appellees without giving the Secretary of Agriculture a reasonable opportunity to correct his procedural mistake and to make a determination as to the reasonableness of the rates which the appellees collected. It is not abuse of discretion to which appellants object but the disregard of the statutory purpose and the abandonment of the equitable principles which should have controlled the action of the court below.

II

The Appellees' Motion to Affirm the Decree of the District Court Should Be Denied

By their motion, appellees seek to have this Court determine the merits of the appeal without the benefit of a full discussion of the difficult and important questions of law involved. The appellees make this request not only despite the fact that a large amount of money is involved, but also despite the fact that the appeal raises important and far reaching questions in the field of administrative law—questions which are so novel that appellees have been unable to cite a single *ad hoc* decision in support of their contention that the appeal is frivolous.

A. THE APPEAL PRESENTS SUBSTANTIAL AND IMPORTANT QUESTIONS OF LAW

This appeal is occasioned by the action of the district court in directing the distribution of the impounded funds to the appellees before the Secretary of Agriculture has had an opportunity to make a determination as to the reasonableness of the excess charges which the impounded funds represent and before the legality and propriety of that determination has been adjudicated by the courts. The appellants contend that this action by the district court was erroneous as a matter of law. It is inconsistent with the purpose of the order under which the funds were impounded and it disregards all of the equitable principles which should have controlled the action of the court.

The terms of the order under which the impounded funds were collected require that the funds be held "pending final disposition of the cause." There is nothing in the terms of the order which requires that the final disposition of the case be made before the substantive rights of the parties have been determined. Neither the mandate of this Court nor the principles of equity jurisdiction require the granting of final relief to the appellees in disregard of the substantive rights of the litigants. Certainly the appellants in consenting to the form of the temporary restraining order contemplated the final disposition of the case on its merits and not upon a mere matter of procedure.

In view of this Court's opinion on rehearing, reserving decision as to "further proceedings" of the Secretary, it is plain that there has been no final disposition of the cause merely because of the entry of a permanent injunction the decree for which reserved jurisdiction so that "other proceedings" might be had as to the distribution of impounded funds.

The argument of the appellees that their right to the impounded funds was determined by the opinion and mandate of this Court is not entitled to serious consideration. The appellees so argued in opposition to the appellants' motion for rehearing last term. This Court expressly rejected that argument in its memorandum opinion denying the application for rehearing, which stated that the record at that time did not raise that question.

Appellees' further argument that they at all times had title to the impounded funds is equally fallacious. An examination of the provisions of the impounding order which are quoted on page 3, *supra,* will disclose that, in addition to depositing the excess charges in court, the appellees were required to file verified statements of the names and addresses "of all persons upon whose behalf such amounts were collected." The persons upon whose behalf the excess charges were collected were the shippers who had been compelled to pay a rate found by the Secretary to be unreasonable. To argue that the terms of the impounding order compel payment of the excess charges to appellees when

there has been no final adjudication on the merits of their right to collect those charges in the first instance is to ignore the plain purpose of the order. The terms of the order certainly do not require, as a matter of law, that the impounded funds be paid out to the appellees before the Secretary of Agriculture has had an opportunity to correct the procedural mistake which made his original order unenforceable and to make a determination as to the reasonableness of the excess charges which appellees collected.

The flagrantly unjust result for which appellees contend—that the shippers should be without effective remedy because the Secretary made a procedural error—was certainly not intended by Congress. The primary purpose of the Packers and Stockyards Act was to protect persons who use the facilities of stockyards against the exaction of unreasonable rates and charges (Sec. 305). It is pursuant to this purpose that Section 310 of the statute authorizes the Secretary of Agriculture to issue orders fixing reasonable rates and charges. The statute does provide that such orders can be made only after "full hearing." But the procedural safeguard can be fully enforced without conferring immunity upon the market agencies or depriving the farmers of the substantive benefits of reasonable rates guaranteed by the Act.

Even if Section 310 of the Act stood alone, it could not fairly be contended that a procedural mistake in the issuance of an order under that section was

intended to conclude the substantive rights of persons not responsible for the mistake. Section 305 of the Act, however, underscores the dominant purpose of the Act. That section, in terms, confers upon appellees' patrons, the shippers, a substantive right, which is independent of the procedural validity of any order issued by the Secretary, that all rates or charges made by petitioners for their services shall be just and reasonable. Section 305 provides:

> All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

This section and Section 307, dealing with unreasonable or discriminatory practices, are the basic provisions of the Act. Examination of the statute as a whole will show that the other provisions, including Section 310, are merely the complementary means adopted by Congress for making effective the primary obligations declared in Sections 305 and 307. The right extended the shippers not to be compelled to pay charges in excess of what is just and reasonable is illusory if it can be irretrievably defeated by a procedural error.

The appellants contend that in the circumstances of this case the Secretary has the power to correct his procedural mistake. The effect of Sections 305

and 310 taken together is to confer upon the Secretary as a necessary incident of his general rate-making authority, the power to correct procedural mistakes and, in the circumstances of this case, to make a determination, after observing all procedural safeguards, as to the reasonableness of the rates collected by the appellees. Any other construction of the statute would permit a procedural mistake, not jurisdictional in character, to foreclose and destroy substantive rights.

If, as here, a litigant has not received a full hearing, as the statute requires, he is entitled to that hearing; he is not entitled to immunity from regulation because of a deviation from proper procedural safeguards when the deviation is not jurisdictional in character and can be corrected without substantial injustice.

There is nothing in the statute which precludes the protection of the farmers by the entry of an order to be given effect *nunc pro tunc*. Appellees ignore completely the well-established distinction between an error and want of jurisdiction. That the Secretary had jurisdiction over the original proceedings which culminated in the entry of the order in dispute, there can be no question. The original proceedings may have been so defective as to enable the appellees to impeach the order by direct attack in the courts. But it can scarcely be urged that the appellees without resorting to the courts could have ignored the order and have refused to comply with it. (Compare *Atlantic Coast*

Line v. *Florida*, 295 U. S. 301, 311.) This Court itself has compared the proceedings before the Secretary to a proceeding in an equity cause before a special master or trial judge where the special master or trial judge accepts the findings prepared by counsel for one of the parties without giving the other party an opportunity to know their contents and present objections. The decree of the trial judge in such an equity proceeding might be voidable, but certainly it could not be ignored or treated as a complete nullity. The impeachment of the original decree would not destroy the jurisdiction of the court, but the cause would be remanded for the correction of the error, and the rights of the parties would not be prejudiced by the running of the statute of limitation or any other circumstances which did not affect the substantial equities of the parties as they existed at the commencement of the suit. There is no reason for applying other or different rules to an administrative proceeding. Adoption of the view here urged would be in harmony with the remedial scheme of the statute, and would have the practical advantage for all parties of permitting the original record to stand—to be supplemented only as the requirements of a full hearing may demand.[3] Above all, such a construction would establish the principle that—save where

[3] Contrary to appellees' contention, we see nothing that should prevent the Secretary from permitting the introduction of new evidence which may be shown to be material, relevant, and competent.

Congress has otherwise expressly provided—enforcement of statutory requirements of a fair hearing is not to have the self-defeating consequence of taking away, without a hearing, substantive rights conferred by the statute.

The fact that the statute does not in detailed language describe the action which the Secretary now proposes to take is of no moment. In the Packers and Stockyards Act Congress provided only a general framework for administrative procedure and judicial review. The details were left to be articulated by the Secretary and the courts. Congress, of course, intended that the process of articulation should produce a system which insured both orderly procedure and substantive justice. It did not intend that the power of the Secretary as the rate-making agency, or the rights of the shippers whom the Act was intended to protect, should be foreclosed and destroyed by a mere procedural mistake.

This Court has often refused to permit mistakes in administrative procedure to destroy substantive rights or to foreclose equities which deserve protection. *Atlantic Coast Line* v. *Florida,* 295 U. S. 301; *Mahler* v. *Eby,* 264 U. S. 32; *Tod* v. *Waldman,* 266 U. S. 113. There is nothing in the Packers and Stockyards Act to warrant a construction which needlessly would magnify procedural errors into an occasion for the immolation of the basic purposes of the Act.

The appellees insist that if the Secretary now makes a determination as to the reasonableness of the excess charges collected by market agencies, that determination must necessarily be regarded as a retroactive rate order. This objection misconceives the character of the determination which the Secretary proposes to make. The Secretary has already reopened the original proceeding, by his order of June 2, 1938. This Court has held that there was a procedural error in the previous administrative hearing. When this error has been corrected in accordance with the opinions of this Court, the Secretary's order will be in fulfillment of its original purpose—to prescribe rates for the future. The effect of that order will be properly and justly to determine the disposition of the impounded funds. It is no more retrospective in its substantive effect than the order of the district court disposing of the funds would have been if the original order had not been subject to procedural error. The policy of Congress in this regard was not that the Secretary should never in any circumstances make orders having retrospective consequences, for reparation proceedings (Sec. 308, 309) are for this very purpose, but that money liability for past conduct should in the ordinary case be established by proceedings initiated by private parties. In the special circumstances of this case, the order of the Secretary will not create a money liability for past conduct but will in practical effect determine rights to money in escrow, thus justly determining the

proper distribution of a fund which was created for the purpose of enabling a decision on the merits to be made without prejudice to the rights of either litigant. The Act in no way prevents this common-sense construction, and the corrected order obviously will not be retroactive in the sense of disturbing executed transactions or vested rights contrary to the intention of Congress. After the Secretary in June 1933, having jurisdiction of the parties and subject matter and acting under color of the statute, made his order, the parties were fully aware that their rights after that date were to be determined in the light of the statute and the Secretary's order.

The appellees insist that what the Secretary proposes to do is to award reparation to shippers for the period between July 22, 1933, and November 1, 1937. But, as it has been explained above, this is not what the Secretary proposes to do and all of appellees' comments with respect to the power of the Secretary to award reparation are therefore beside the point.

Appellees also assert that the rates which they have collected were *lawful* as opposed to merely *legal* rates and are therefore immune from attack. But the Secretary intends to exert his general rate-making power and not his power to award reparation; and the distinction between lawful and legal rates imposes no limitation on the rate-making power. And, in any event, rates which appellees collected were not *lawful* as distinguished from *legal* rates. See *Arizona Grocery Co.* v. *Atchison,*

etc., Ry. Co., 284 U. S. 370. They were not, as appellees assert, lower than effective maximum rates duly established by the Secretary after a full administrative hearing. The maximum rates to which appellees refer were rates which resulted from an arbitration proceeding. They were not established by order of the Secretary; he merely acquiesced in their filing in the same way he might acquiesce in any other schedule of rates voluntarily filed by appellees.

B. THE SUGGESTION THAT THE APPEAL WAS TAKEN FOR PURPOSES OF DELAY IS UNWARRANTED

The appellees also move to affirm the order of the district court on the ground "that it is manifest that the appeal was taken for delay only." Nothing in the record affords a shred of support for appellees' assertion that the appellants are in any way seeking to delay the final adjudication of this controversy. At all times since May 31, 1938, when this Court denied the petition for a rehearing of the prior appeal in this cause (58 S. Ct. 773; 82 L. ed. 1031), the appellants have made every effort to obtain a speedy adjudication of this controversy. On June 2, 1938, the Secretary of Agriculture issued a signed order reopening the administrative proceeding, serving tentative findings of fact and conclusion, and order upon the appellees, and giving them thirty days in which to file exceptions thereto. On June 11, 1938, the appellants filed a motion in the district court seeking to stay the distribution

of the impounded funds until such time as the Secretary should make an order in the reopened administrative proceeding and the merits of that order should have been finally adjudicated. On June 18, 1938, the district court denied the appellants' motion and entered a final order and decree directing that the impounded funds be distributed to appellees. An appeal from that final order and decree was perfected on June 30, 1938, and the case was docketed in this Court on July 25, 1938.

CONCLUSION

The appellees' motion to dismiss or in the alternative to affirm should be denied.

Respectfully submitted.

WARNER W. GARDNER,
Acting Solicitor General.

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